Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

Workplace Safety and Insurance Appeals Tribunal

Quarterly Production and Activity Report

April 1 to June 30, 2015

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Production Summary

At the end of the second quarter 2015, the active inventory totaled 9,314 appeals. This is approximately 2.5 % higher than the active inventory at the end of the first quarter in 2015.

Incoming Appeals

Incoming appeals for Q2-2015 numbered 1,150; of these, 1,026 were appeals from WSIB decisions, and 124 appellants advised they were ready to proceed to hearing following a period of inactive status. In 2014, incoming appeals averaged 1269 per quarter

The weekly average of hearing-ready appellants in Q2-2015 is 89. This figure excludes cases reactivated from the Inactive status In 2014, the weekly average of hearing-ready appellants was 87, excluding reactivations.

Dispositions

Dispositions in the second quarter of 2015 totaled 1,045. This includes 330 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 715 after-hearing dispositions; of the after-hearing dispositions, 701 followed from Tribunal decisions.

Inactive Inventory

At the end of Q2-2015, the inactive inventory was 1,890 cases. This is a decrease of approximately 6% from the inactive inventory at the end of Q1-2015.

Decisions Released within 120 Days

For the year to date ending Q2-2015, 92% of final decisions were released within 120 days. Comparisons to earlier years can be found in section F: Production Charts.

The Notice of Appeal Process

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the second quarter of 2015, the notice inventory included 1,524 dormant cases, the active inventory totaled 9,314 cases, and the inactive inventory totaled 1,890 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2014	7972
Q2-2014	8396
Q3-2014	8668
Q4-2014	8836
Q1-2015	9089
Q2-2015	9314

B. Incoming Appeals

Period	Incoming Appeals
Q1-2014	1369
Q2-2014	1386
Q3-2014	1214
Q4-2014	1107
Q1-2015	1159
Q2-2015	1150

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2014	934	304	630
Q2-2014	993	302	691
Q3-2014	895	266	629
Q4-2014	980	307	673
Q1-2015	1001	330	671
Q2-2015	1045	330	715

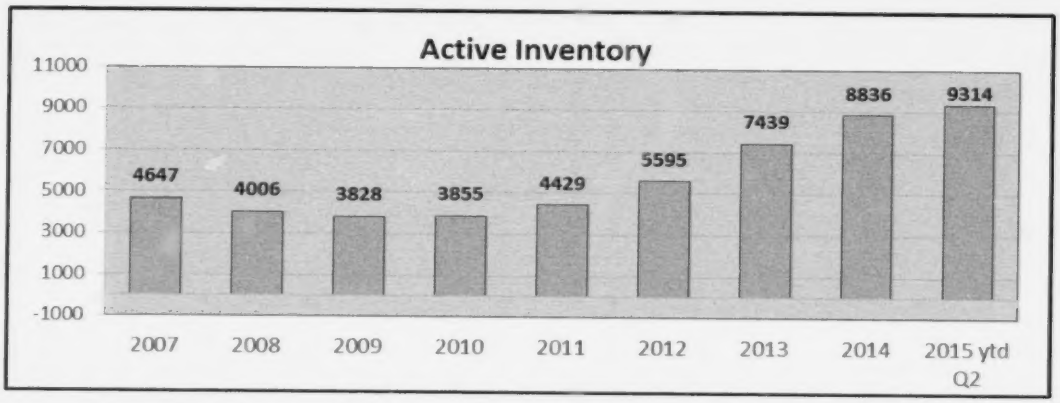
D. Inactive Inventory

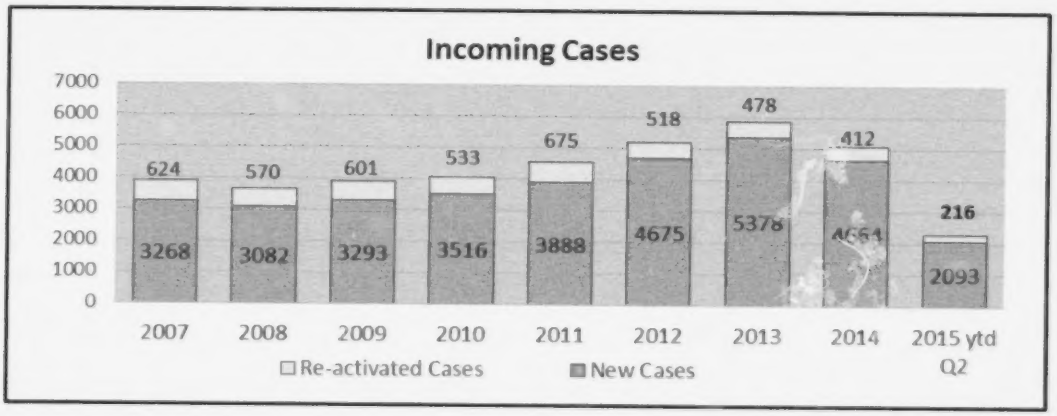
Period	Inactive Inventory
Q1-2014	2272
Q2-2014	2220
Q3-2014	2148
Q4-2014	2091
Q1-2015	2006
Q2-2015	1890

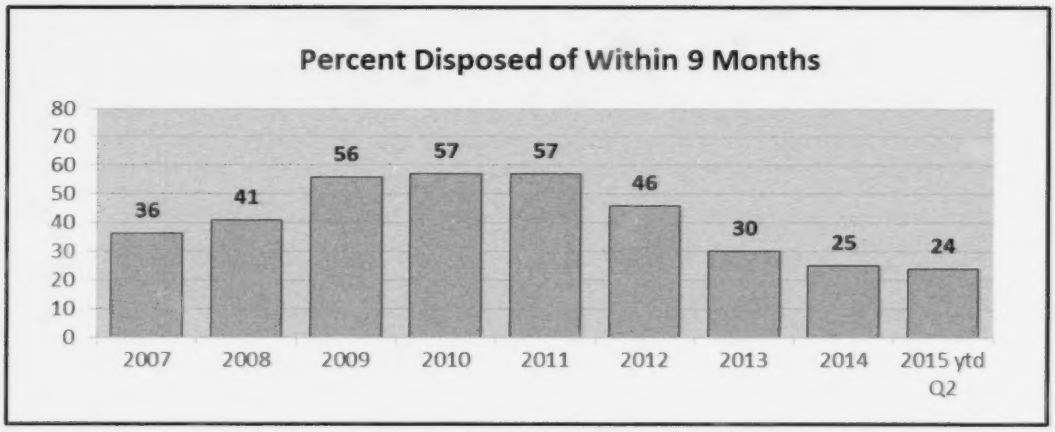
E. Notice of Appeal (Dormant cases)

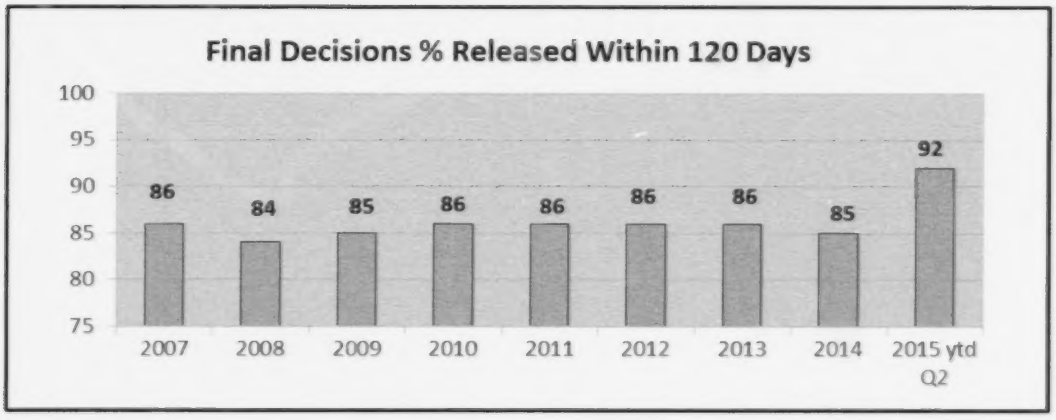
Period	Total Dormant	Change from Previous Quarter
Q1-2014	1764	-98
Q2-2014	1733	-31
Q3-2014	1780	47
Q4-2014	1739	-41
Q1-2015	1644	-95
Q2-2015	1524	-120

F. Production Charts: From 2007 to 2015






Percent Disposed of Within 9 Months
80
70
60
50
40
30
20
10
0
36
41
56
57
57
46
30
25
24
2007
2008
2009
2010
2011
2012
2013
2014
2015 ytd Q2


Final Decisions % Released Within 120 Days
100
95
90
85
80
75
86
84
85
86
86
86
86
85
92
2007
2008
2009
2010
2011
2012
2013
2014
2015 ytd Q2

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the second quarter of 2015 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. ***Decisions Nos. 512/06I* (January 19, 2007), *512/06* (November 2, 2011) and *512/06R* (December 10, 2013)**

   This was the first case where a Tribunal decision on the *Canadian Charter of Rights and Freedoms* (Charter) was subject to judicial review.

   The worker injured his back in 2001, when he was 63 years of age. The Board paid the worker loss of earning (LOE) benefits until May 31, 2002, when the worker turned 65, which was also the mandatory retirement date set by the employer.

   The worker appealed to the Tribunal for LOE benefits after May 31, 2002 for his back, and also for benefits for a right shoulder injury. In *Decision No. 512/06I*, a single Vice-Chair denied the appeal for the worker's right shoulder, but granted the worker entitlement to LOE benefits from May 31, 2002 until February 5, 2003, (which was two years after the injury) pursuant to s.43(1)(c) of the *Workplace Safety and Insurance Act* (WSIA).

   The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened s.15(1) of the Charter.

   The Ontario Attorney General participated in the Tribunal hearing. The Office of the Worker Adviser (OWA) and the Office of the Employer Adviser (OEA) were invited to participate as interveners. The OWA accepted, and became co-counsel with the worker's representative. The OEA withdrew from the appeal.

   The hearing reconvened with a full Panel to consider the Charter issue. In *Decision No. 512/06*, the majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of s.15(1) the Charter.

   The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

   The majority characterized the test for whether the Act violates s.15(1) of the Charter to be (a) if the Act creates a distinction based on an enumerated ground and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age. The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

   The majority noted there had been no Charter decision in a Canadian court which had successfully challenged the termination of benefits at age 65. The majority also noted that age 65 is still when most people retire and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would

have worked after age 65 or had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two year statutory limit. Further, a two year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65 are eligible for other sources of income, such as the Canadian Pension Plan (CPP). Viewed contextually, the majority found the two year limit does not perpetuate prejudice of workers aged 63 and older. Even if section 43(1)(c) did violate s.15(1) of the Charter, it constituted a reasonable limit under s.1 of the Charter.

In his dissent, the Vice-Chair found that the workplace insurance scheme was both an insurance scheme for employers and a social benefits program for workers. He found that s.43(1)(c) was discriminatory as it failed to consider the disadvantaged position of older workers, and limited their entitlement to benefits they might be entitled to if they had been younger. The Vice-Chair found that s.43(1)(c) was not saved under s.1 of the Charter. The Vice-Chair would have allowed the worker LOE benefits until age 71.

The worker commenced an application for judicial review. After the Tribunal filed its Record, counsel for the worker attempted to submit new evidence for the judicial review. As the respondents objected, counsel for the worker then attempted to commence an application to reconsider *Decision No. 512/06*, while the judicial review was still pending. As the respondents objected to this approach as well, the worker decided to withdraw the judicial review and pursue a further reconsideration at the Tribunal. The respondents consented to the withdrawal, though the Tribunal insisted on payment of costs incurred from producing the Record.

The worker then filed a request for reconsideration of the WSIAT decision. Since the original Tribunal Vice-Chair had passed away, a new Vice-Chair had to be assigned to hear the reconsideration.

The reconsideration was denied in *Decision No. 512/06R*. The new Vice-Chair did not accept the worker's argument that there was substantial new evidence not available at the time of the hearing which would likely have changed the outcome of the decision.

In January 2014, the worker filed a new application for judicial review, this time of *Decisions Nos. 512/06 and 512/06R*. Factums were filed by the worker, the employer, and the Attorney General, as well as by two interveners: the Industrial Accident Victims Group of Ontario (IAVGO), and the Schedule 2 Employer's Group. The judicial review was heard on December 1, 2014 by Marrocco ACJ, Nordheimer, and Horkins JJ.

The Divisional Court unanimously dismissed the judicial review. In the decision dated December 17, 2014, the Court agreed with the majority of the Tribunal that the *WSIA* is not a social benefits scheme. The Court also found the two year limit on LOE benefits in s.43(1)(c) was not discriminatory and not contrary to s.15(1) of the Charter. Benefits were not denied to workers because of a stereotypical attitude, but because of the evidence before the Tribunal that 90% of workers retire by age 65, and 90% of injured workers over 61 recover within two years.

As the Court noted, if the WSIA provided that injured workers were to receive LOE benefits until they died, that would imply people would work until they die. "Both intuitively and statistically this seems incorrect."

The Court said that even if they were wrong about that, s.43(1)(c) was saved by s.1 of the Charter. This was because it accepted the majority's finding that any limitation on rights here was justified by a pressing and substantial objective of paying LOE for wage loss resulting from injury, in a financially responsible way. Not paying benefits past the age workers would likely have retired was in accordance with this objective.

Referring again to the evidence before the Tribunal that 90% of workers retire by age 65, and 90% of injured workers over 61 recover within two years, the Court agreed that s.43(1)(c) minimally impairs entitlement for injured workers over age 65.

The Court was not persuaded that it should follow more generous approaches in other provinces, because Ontario is entitled to deference on how it wants to compensate injured workers.

Although the standard of review for WSIAT decisions on constitutional questions is correctness, the Court affirmed that it will give deference to WSIAT Charter decisions on underlying matters, such as the nature of the workers' compensation scheme, the balancing of competing interests, and the purpose of its home statute.

The worker subsequently filed a motion for leave to appeal to the Ontario Court of Appeal in February 2015. In March 2015, the Tribunal filed a factum stating that the worker's motion for leave to appeal should be dismissed. Factums were also filed by the employer and the Attorney General of Ontario. In April 2015, the worker's motion for leave to appeal was dismissed by the Court of Appeal.

2. *Decisions Nos. 959/13* (June 13, 2013) and *959/13R* (October 31, 2013)

The worker's appeal for entitlement for non-economic loss (NEL) benefits for his low back, and to LOE benefits from August 17, 2010, was denied by the Tribunal Panel.

The worker was a foreman with a paving company who injured his back at work in April 2009. The Panel found that the worker's compensable condition resolved by the time the WSIB terminated LOE benefits in 2010, as the worker's non-compensable factors were responsible for his complaints. Further, the Panel found the worker had been offered suitable work at no wage loss.

The worker's application for reconsideration was denied. In the reconsideration decision, the same Vice-Chair clarified that there had been no ruling on the worker's potential psychological entitlement, so there was nothing that would preclude the worker from pursuing entitlement at the WSIB pursuant to the Chronic Pain or Psychotraumatic policies.

In December 2013, the worker commenced an application for judicial review. Counsel for the worker and the Tribunal have agreed the judicial review will not proceed until the worker has obtained a ruling on psychological/chronic pain entitlement. The WSIB issued a decision in December 2014 denying the worker entitlement for chronic pain disability and psychotraumatic disability. The worker has initiated an appeal at the Tribunal.

3. *Decisions Nos. 1135/12* (May 9, 2013) and *1135/13R* (December 16, 2013)

An apprentice who worked for an auto repair shop helped his employer deliver a derelict vehicle to a recycling/scrap dealer. This worker steered the vehicle down a public street while being pushed from behind by his employer's vehicle. Once they arrived at the scrap yard, the worker remained in the derelict vehicle while a bobcat pushed it on to a weigh scale. Due to a failure to communicate, when the bobcat pushed the vehicle off the scale it was immediately crushed by a crane while the worker was still inside. The worker suffered serious injuries.

The worker commenced an action against the scrap yard, and three employees of the scrap yard. These defendants then commenced a third party action against the worker's employer.

The worker received statutory accident benefits (SABs). The insurance company which provided these benefits, as well as the third parties, applied to the Tribunal under s.31 of the *WSIA* for a determination of whether the worker's rights of action was taken away. The only issue was whether the worker and the three workers of the scrap yard were in the course of their employment when the accident occurred.

The Vice-Chair found on the balance of probabilities that both the worker and the defendant's employees were in the course of their employment when the accident happened. The lawsuit brought by the worker was barred by s.28 of the *WSIA*, and the grounds for the third party action no longer existed. Consequently, the worker was entitled to benefits from the insurance plan.

The worker commenced an application for judicial review. Following the Tribunal's request for the worker to amend his proceedings to add the Tribunal as a party, the Tribunal filed its Record of Proceedings, as well as a responding factum. The judicial review was heard on April 15, 2015. The Tribunal is awaiting the release of the Court's decision.

4. *Decision No. 2214/13* (March 21, 2014)

In 1967, the worker, then employed as a police officer, suffered injuries to his upper body when he was attacked by a prisoner. He left the police force two years later. He then embarked on a career operating garages, working for a truck rental company, and as a millwright. He was involved in a motor vehicle accident in 1973, and suffered a number of work accidents including various low back injuries. The WSIB denied ongoing entitlement for the low back, and initial entitlement for the neck, shoulders and arms. The worker appealed to the Tribunal.

Due to the date of the 1967 accident, the pre-1985 Act applied to the worker's appeal.

The Panel held the worker did not have ongoing entitlement for the low back or shoulders as a result of the 1967 accident. However, the Panel found the 1967 accident caused a temporary aggravation of a pre-existing back and neck condition.

In May 2014, the worker, who is self-represented, commenced an application for judicial review. In June 2014, the worker asked the Tribunal to postpone its activities related to the judicial review application so that he could receive legal direction from the OWA regarding his application. In January 2015, the worker informed the Tribunal that he

wished to move forward with his application. The Tribunal filed its Record of Proceedings in early March 2015 and is waiting to receive the worker's factum.

5. *Decisions Nos. 1769/11* (November 17, 2011) and *1769/11R* (March 14, 2013)

The worker was employed in two jobs, one in construction and one in a night club. He was injured on the construction job. He was initially granted WSIB benefits calculated on the short-term basis of his earnings from his concurrent employment with both employers.

The worker had an inconsistent employment history. When his long-term benefits were calculated, the benefits were based on a finding that the night club job was only short-term. The worker appealed, alleging that his long-term average earnings should be the same as his short-term earnings.

The appeal was denied. The Panel examined the worker's employment history, as well as the two concurrent jobs. It found the worker's employment pattern demonstrated short-term, non-permanent employment, which included both the worker's concurrent jobs. Board policy established that it was not fair to calculate long-term earnings on the basis of non-permanent jobs. The Panel agreed with the Board that the long term earnings should be calculated on the basis of average earnings from all concurrent employment during the recalculation period.

The worker's application for reconsideration was dismissed by a different Vice-Chair.

In November 2014, the worker commenced an application for judicial review. It is not clear why there was a delay of almost three years in commencing the judicial review application. The Tribunal filed its Record of Proceedings in February 2015 and is waiting to receive the worker's factum.

6. *Decision No. 398/14* (March 11, 2014)

B was a passenger in a car driven by P, his co-worker. B was injured when P's car went off the road. B applied for, and received statutory accident benefits. The insurer of the driver of the car applied to WSIAT for an order that B's right of action was taken away.

Both B and P had been hired to work on a construction project at a cottage in a rural area. They were staying at a nearby motel, which was booked and paid for by their employer. P was paid some monies for mileage by the employer for the use of his car. Both B and P were given a per diem for food and other expenses while working remotely. While working at the cottage, they drove to a restaurant, located in the town closest to their worksite, for their lunch break. The accident occurred after lunch, on the way back to the worksite. The main issue was whether B and P were in the course of employment at the time of accident.

The Vice-Chair characterized the issue as whether B was involved in an activity that was reasonably incidental to employment at the time of the accident. He reviewed Board policy, and noted that although the general rule was that a person is not in the course of employment after leaving the worksite, there was an exception for workers travelling on their employer's business and who must stay overnight at a motel paid for by their employer.

Further, although a worker is often not in the course of employment during a lunch break, Tribunal decisions have taken a broader approach to what is reasonably incidental when travelling workers are staying overnight at accommodations paid for by their employer. Lunch breaks in this situation have been viewed to be reasonably incidental to employment.

The Vice-Chair noted that a worker can still take themselves out of the course of employment if he or she was engaged in a personal activity at the time of the accident that was not connected to his employment. The Vice-Chair found that in this case there was no personal activity other than going to lunch. The workers had eaten at the closest and only restaurant in the area. After lunch, the two workers proceeded directly back towards the worksite.

The Vice-Chair found that B's right of action was taken away.

In September 2014, B commenced an application for judicial review. An issue arose as to whether all of the appropriate parties had been named in the style of cause. This issue is being resolved and the Tribunal will be filing its factum shortly.

7. *Decision No. 797/14* (July 31, 2014)

The worker sustained a compensable injury to his low back in September 1986. In October 1988, the worker was awarded a 10% permanent disability pension (PD). In October 2005, the worker was re-assessed for his PD. In June 2006, the worker's PD award was increased from 10% to 15% between October 1988 and August 2001 and to 20% as of August 2001. The 20% PD award was upheld in a January 2013 decision of an Appeals Resolution Officer. The worker appealed this decision to the Tribunal. After a written hearing, the Vice-Chair denied the worker's appeal in a July 2014 decision.

In March 2015, the worker commenced an application for judicial review. The Tribunal has filed its Record of Proceedings and has received the worker's factum, and is currently preparing its own factum.

8. *Decision No. 2324/13* (June 4, 2014)

The worker appealed to the Tribunal for initial entitlement for benefits for mental stress. The worker worked as a correctional officer at a medium security prison and sought entitlement in relation to three specific incidents. The worker's claim for benefits for mental stress was allowed by the Tribunal in relation to one of the three specific incidents. The issue of the quantum and duration of benefits was referred back to the WSIB.

In March 2015, the worker, who is self-represented, initiated an application for judicial review in the Federal Court. The worker also initiated a motion seeking an extension of time to issue and serve his application, as the application was late. The Tribunal wrote to the worker and advised that the judicial review application had been commenced in the wrong court and that the application had not been properly served. The Tribunal informed the worker that he was required to bring an application for judicial review in the Divisional Court if he wished to judicially review a Tribunal decision.

In a written order issued on April 2, 2015, the Federal Court dismissed the worker's request for a time extension as his application was "doomed to fail" in light of the application being initiated in the wrong court.

9. *Decisions Nos. 2185/13* (November 26, 2013) and *2185/13R* (November 10, 2014)

Defendants in a civil action initiated a right to sue application relating to a motor vehicle accident. The Defendants asked the Tribunal to determine that the plaintiff's right of action had been taken away. It was determined that the defendants were Schedule 1 employers at the time of the accident and the plaintiff was a worker of a Schedule 1 employer and in the course of her employment at the time of the accident. Therefore, it was determined that the plaintiff's right of action was taken away.

Neither the Plaintiff nor the Plaintiff's legal representative appeared at the Tribunal hearing. The Plaintiff's legal representative had also not confirmed that he was planning on attending the right to sue hearing, nor had he filed any responding materials. A week after the hearing, the representative informed the Tribunal that he had arrived late to the hearing and that the hearing had already concluded. The representative filed a reconsideration request alleging that there had been a fundamental error of procedure by proceeding with the hearing in his absence.

The application to reconsider was denied. The hearing was scheduled to start at 9 a.m. The recording of the hearing indicated that it commenced at 9:15 a.m., 15 minutes after the scheduled start time. At 9:20 a.m., the Vice-Chair noted that the plaintiff and her representative were still not present, and decided to proceed with the hearing.

It was found that the use of the word "shall" in the Tribunal's Practice Direction regarding "Right to Sue" Applications unequivocally indicates that a respondent in a right to sue application must file materials. As the respondent had not filed materials, the Tribunal's Practice Direction: *Notice of Hearing and Failure to Attend* was not applicable and, as a result, the requirement to wait 30 minutes also was not applicable, because the plaintiff had not given any indication that she wished to participate in the hearing. Accordingly, it was determined that there was no error of process.

The Tribunal received notice of a judicial review application in February 2015. However, discussions took place between the plaintiff and defendant to the civil claim, and the Applicant subsequently confirmed that the application would be abandoned. A notice of abandonment was received by the Tribunal in June 2015.

10. *Decisions Nos. 645/11* (June 14, 2012) and *645/11R* (March 23, 2015)

Decision No. 645/11 granted the worker LOE benefits after mid-July 2004, as well as entitlement to benefits for a psychotraumatic disability.

The WSIB paid the worker full LOE benefits until October 2006, and then partial LOE benefits until the worker reached age 65 in 2012. The worker initiated a judicial review application seeking a writ of mandamus to compel the WSIB to implement *Decision No. 645/11* fully by granting her full LOE benefits to age 65. The Tribunal was not named as a party in the original judicial review application.

The WSIB subsequently sought clarification from the Tribunal regarding *Decision No. 645/11* and specifically the duration of the allowance of full LOE benefits.

In *Decision No. 645/11R*, the Vice-Chair considered whether the request for clarification should proceed or whether the clarification request should be put on hold until the worker's court application had resolved. The Vice-Chair determined that the request for clarification should proceed without waiting for the resolution of the court proceeding. The Vice-Chair noted that proceeding with the request was the quickest and most efficient way of resolving the apparent dispute as to the intent of *Decision No. 645/11* regarding ongoing LOE benefits. Further, the Tribunal was in the best position to understand the nature of the dispute and to provide clarification, which could help avoid unnecessary litigation.

The Vice-Chair clarified *Decision No. 645/11* by stating that the decision did not grant the worker full LOE benefits to age 65. Instead, the decision granted full LOE benefits to the worker after mid-July 2004, with the duration of those benefits being left to be determined by the WSIB and the worker having all usual rights of appeal.

In June 2015, the Tribunal was served with an amended Application for judicial review that now named the Tribunal as an additional Respondent. The Tribunal is waiting for the Applicant to order the transcript of the Tribunal hearing, following which the Tribunal will file the Record of Proceedings.

11. *Decisions Nos. 493/13* (April 29, 2013) and *493/13R* (December 16, 2014)

In *Decision No. 1309/01*, the worker had been granted entitlement to s.147(4) supplementary benefits under the pre-1997 Act. The worker then appealed a decision of the WSIB regarding the calculation of the supplement.

In *Decision No. 1387/07*, the Tribunal upheld the decision of the WSIB and determined that the amount of benefits owing under s.147(4) is subject to subsections (8), (9) and (10). Therefore, it was determined that the WSIB had correctly based the supplement on the maximum payable pursuant to s.147(8).

The worker's subsequent request for reconsideration of *Decision No. 1387/07* was denied in *Decision No. 1387/07R*. The worker then applied for judicial review of *Decisions Nos. 1387/07* and *1387/07R*. At the same time, judicial review of *Decision No. 1858/08* was also initiated, which was a decision concerning an identical issue. The Divisional Court dismissed both applications.

In *Decision No. 493/13*, the worker appealed a WSIB decision concerning whether supplementary benefits had been correctly calculated at the 24 and 60 months reviews. In the decision, the Vice-Chair referred to the Divisional Court's decision in *Rustum Estate v. Ontario (Workplace Safety and Insurance Tribunal)* (which was the judicial review decision of *Decision No. 1858/08*) as well as the Tribunal's *Decision No. 941/94*. The Vice-Chair concluded that the intent of s. 147(4) was not to provide income replacement, but instead to provide workers who were either unemployable or unable to benefit from vocational rehabilitation services with an additional amount. This additional amount would be calculated according to subsection (9) or (10), and would not exceed the Old Age Security cap pursuant to subsection (8).

The Vice-Chair noted that subsection (13) is a supplement given under subsection (4), and that on a plain reading of the section, subsection (4) is always subject to subsection

(8). Therefore, the Vice-Chair determined that the Board had correctly determined the amount of the supplement benefits at the 24 and 60 months reviews, and the appeal was dismissed.

The worker then sought clarification of two issues arising out of *Decision No. 493/13*. First, the worker sought clarification that *Decision No. 941/94* dealt with a different issue than the issue before the Vice-Chair in *Decision No. 493/13*. The Vice-Chair noted that the review in *Decision No. 941/94* was thorough and had been relied upon in numerous other Tribunal decisions, and declined to grant this request for clarification. The Vice-Chair made a clarification regarding a reference to the *Rustum Estate v. Ontario (Workplace Safety and Insurance Tribunal)* decision but generally found that the worker was essentially trying to reargue issues raised and already addressed in *Decision No. 493/13*.

In June 2015, the worker commenced an application for judicial review of *Decisions Nos. 493/13* and *493/13R*, as well as *Decisions Nos. 827/13* and *827/13R*, which are discussed below. In this application, the worker is seeking an interlocutory order certifying the judicial review as a class proceeding on behalf of all persons whose benefits pursuant to s.147(13) of the *Workers' Compensation Act* have been subjected to a maximum cap pursuant to section 147(8) of the *Workers' Compensation Act*.

12. *Decisions Nos. 827/13* (May 13, 2013) and *827/13R* (December 16, 2014)

In *Decision No. 827/13*, the worker appealed a WSIB decision regarding whether supplementary benefits had been correctly calculated at the 24 and 60 months reviews. The issue in this decision was the same as the issue raised in *Decision No. 493/13*.

The worker submitted that the calculation on the reviews should not be capped by the Old Age Security limit in s.147(8). The Vice-Chair disagreed with the worker's argument and noted that this argument had been considered and rejected in several previous Tribunal decisions, including *Decision No. 621/12*. The reasons for rejecting the argument were carefully reviewed in *Decision No. 621/12*, and it was determined that s.147(8) applies in calculating a worker's benefits on reviews as well as on the initial determination. The Vice-Chair agreed with the reasoning in *Decision No. 621/12* and the appeal was dismissed.

The worker then sought clarification of *Decision No. 827/13*. The worker's request for clarification was denied as it was determined that the original Vice-Chair had made a thorough and persuasive review of the issue raised in *Decision. No. 827/13*.

In June 2015, the worker initiated an Application for Judicial Review of *Decisions Nos. 827/13* and *827/13R*, as well as *Decisions Nos. 493/13* and *493/13R*, which are discussed above. In this application, the worker is seeking an interlocutory order certifying the judicial review as a class proceeding on behalf of all persons whose benefits pursuant to s.147(13) of the *Workers' Compensation Act* have been subjected to a maximum cap pursuant to s.147(8) of the *Workers' Compensation Act*.

Action in Superior Court - *Decisions Nos. 691/05* (February 11, 2008) and *691/05R* (June 13, 2013)

Following four days of hearing, the Panel allowed this self-represented worker's appeal in part. The worker was granted initial entitlement to benefits for his neck, and for various periods of temporary partial disability benefits. He was denied initial entitlement for an injury to his upper and mid-back; for a permanent impairment for his upper, mid-back and neck; for labour market re-entry (LMR); and for reimbursement of travel expenses. The WSIB's determination of the worker's future economic loss (FEL) and his supplemental employee benefits (SEB) were found to be correct.

In July 2013, the Tribunal and the WSIB were served with a Notice of Application, issued out of the Superior Court of Justice, asking that *Decisions Nos. 691/05* and *691/05R* be set aside. The Tribunal wrote to the worker to advise that he had clearly commenced proceedings in the wrong court. The Tribunal informed the worker that if he wanted to challenge the Tribunal's decisions, he was required to bring an application for judicial review in the Divisional Court. The Tribunal further advised the worker that if he did not immediately file a Notice of Abandonment, the Tribunal would bring a motion to dismiss the application.

The worker abandoned his action in August 2013.

In February 2014, the worker commenced a new action against the WSIB and the Tribunal, this time claiming relief of over six million dollars. Much of the claim contains allegations against the WSIB, but the claim also takes issue with the Tribunal's decisions, alleging errors and bad faith. It alleged the worker had been threatened by one of the Panel members. The worker also served the Tribunal with what appears to be a surreptitious recording.

The Tribunal and the WSIB each brought a motion to dismiss the worker's action. The motions were scheduled for October 22, 2014. The worker subsequently advised that he wanted to adjourn the motions. The motions were subsequently scheduled to be heard on February 23, 2015. These motions were adjourned and have been scheduled to be heard on October 18, 2015.

Recent Decisions

Status of executive officers – construction industry

Decision No. 1794/12 addressed the status of a party who, at the time of the accident, alleged he was an executive officer and not a worker. The party was the principal of a company which was engaged as a subcontractor on a construction site .The decision noted the Board's recent policy OPM Document 12-01-06 – "Expanded Compulsory Coverage for Construction," referring to its previous version of January 2, 2013. Under this policy, independent operators, sole proprietors, partners and executive officers in the construction industry, with some exceptions, are deemed to be workers. As the accident in this case occurred prior to the application date of the new policy, the law which was in effect at the time of the accident was applied in the application.

The Vice-Chair found that the party was an executive officer and not a worker. The company incorporated by the party was not "a sham." The fact that the party worked on tools with his employees at the time of the accident did not mean that he was a worker for the purposes of the WSIA when he was doing that work. Sections 11 and 12 do not contemplate that a person's status would change from hour to hour, or day to day, depending on what work he was doing. A person with "executive officer" status may work and remain subject to optional coverage. Section 11(2) provides that a worker who is an executive officer is not subject to mandatory coverage. This reflected that an executive officer may be a worker, and still be engaged in the work of the business (see Decision No. 475/97).

Also the worker's union membership in this case was not sufficient to be determinative of "worker" status (see Decisions Nos. 1816/14I and 168/11).The Vice-Chair noted further that while the Collective Agreement of the union required the party to obtain WSIB coverage and that in not doing so the executive officer may have breached his obligations under this agreement, the Tribunal did not have jurisdiction to address that breach by determining that the plaintiff was a worker (see Decision No. 1435/97).

Occupational stress

Decision No. 1820/14 allowed a worker's claim for occupational mental stress arising from an incident which the worker, at the time, believed was a prank on the part of his co-workers.

The worker was on the back side of a hoist watching a 600 volt cable to ensure it did not get caught in the hoist wheels. There was a hoist operator and two other observers. As the hoist travelled north, the 600 volt cable became taut. At the same time, one of the observers yelled to the operator to stop the travel. The injured worker was straddling the cable and was lifted off the ground before the hoist came to a stop.

The worker alleged that the incident was a prank on the part of his co-workers, and believed that the incident was intentional. However, an investigation was conducted which concluded that although there were some inappropriate comments made at the time, there was no proof that the incident was intentional. In the appeal, the employer submitted that the incident was not deliberate, but simply an accident.

The Panel was of the view that, being suspended on a 600 volt power cable at a level above the top of a safety railing on the edge of a dam, satisfied the policy requirement of being objectively traumatic and was consistent with the examples outlined in the Board policy of such events, which include threats of physical harm. It was therefore unnecessary to determine whether the incident was intentional. Even if one were to accept that the co-workers did not lift the worker up on purpose, an average worker would have found being placed in such a position objectively traumatic.

Final LOE reviews

Decision No. 494/15 upheld the Board's deferral of the final review of LOE benefits, where a worker had been granted entitlement for psychotraumatic disability a few weeks before the date of the final review.

The worker was injured in July 2005 and received a 47% NEL for a neck and upper back injury. She stopped working in June 2007. In June 2011, an ARO decision found that the worker was entitled to full LOE benefits from June 2007, as well as finding entitlement for psychotrumatic disability. The Board then deferred the final LOE review until January 2013.

According to subsection 44(2) of the WSIA, the final LOE review would have occurred on July 2011. Until the June 2011 ARO decision, rendered a couple of weeks before this date, entitlement had still not been recognized for psychotraumatic disability. If the final review was conducted in July 2011, it was unlikely that it would have been able to take into account any of the psychological restrictions given the late June 2011 timing at which psychiatric entitlement was granted. After allowance of psychiatric entitlement, it was therefore appropriate for the Board to look into assisting the worker in rehabilitation of a psychological and work-related nature. The deferral of the final LOE review, therefore, was not artificial, but legitimate in this case

Subsection 44(2.1)(g) of the WSIA permits the Board to review LOE payments more than 72 months after the date of the injury if the worker is co-operating in health care measures. The worker was in fact co-operating in health care measures in the nature of occupational therapy, a medication review and psychological counselling. It was therefore appropriate for the Board to defer the final LOE review to January 2013.

Transfer of costs

Decision No. 651/15 denied a request for transfer of costs under s.84 of the WSIA by a personnel agency. The agency claimed that the costs of a claim should be transferred from its account to that of the employer to which the worker was assigned at the time of the accident.

While working for this employer, the worker was walking from its parking lot towards a building when she was attacked by a group of Canada geese, which apparently were protecting a nesting area. She attempted to defend herself by waving her arms to ward off the geese, and in so doing, fell and injured her right arm and shoulder.

The Panel concluded that the injury was not caused by the negligence of the assigned employer and, therefore, the request of transfer of costs was denied. The evidence indicated that there had been only a single prior incident in which an employee had been attacked by a goose in the parking lot, though according to the preponderance of the evidence, this attack did not result in an injury to the employee and the employer had taken reasonable steps to address the risks associated with the geese. Supervisors were also instructed to post notices on bulletin boards. In addition, a notice was posted on the front door, and parking spaces adjoining the birds' nesting area were roped off. In addition, the employer made inquiries about having the birds removed from the area, but was informed that this would be difficult because the geese were a protected species.

WSIAT
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